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No. 90-134

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1990

THOMAS RUSSELL COONEY AND
LORA JOHN COONEY,
*Petitioners,*
vs.
CHRIS J. WHITE,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE WYOMING SUPREME COURT

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

I. Whether a deputy county attorney's activities in using an allegedly perjured probation revocation petition to obtain a bench warrant, and in causing the probationer to be arrested and detained, were the functional equivalent of a prosecutor's role as an advocate in a criminal proceeding, and hence entitled to absolute immunity.

## PARTIES TO THE PROCEEDING

The Petitioners, plaintiffs below, originally filed suit against defendants Park County, Wyoming; the State of Wyoming; the Wyoming Department of Probation and Parole; Robert Mayor, a probation officer with the Department; and Chris J. White, deputy county attorney for Park County. Petitioners have listed Chris J. White as sole Respondent in this matter, stating that he is the only defendant below with an interest in the outcome of the case before this Court. (Pet. p. ii.) Counsel for Respondent White agrees that the issue presented affects only him, and that he is properly listed as the sole Respondent; however, the Court is advised that counsel for all defendants to the proceedings are aware of this action and acquiesce in the Attorney General's response on behalf of Respondent White.

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The Respondent, Chris J. White, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the judgment and opinion of the Supreme Court for the State of Wyoming.

### DECISION BELOW

The initial decision on the question presented was rendered by the Honorable John T. Dixon, District Court Judge for the Fifth Judicial District, Park County, Wyoming. It was submitted to the Court in the Appendix accompanying the Petition for Writ of Certiorari. (App. p. 1.)

The district court's decision was appealed to the Wyoming Supreme Court, to which court Petitioners seek

issuance of a writ of certiorari. The opinion of the Wyoming Supreme Court, *Cooney v. Park County*, is reported at 792 P.2d 1287 (Wyo. 1990).

## STATEMENT OF THE CASE

The Respondent incorporates by reference the statement of facts set forth in *Cooney v. Park County*, 792 P.2d 1287, 1288-1291 (Wyo. 1990).

## REASONS FOR NOT GRANTING THE WRIT

In responding to the petition, Respondent acknowledges that on June 28, 1990, this Court granted a petition for writ of certiorari in the case of *Burns v. Reed*, No. 89-1715, which presents questions regarding the scope of prosecutorial activities shielded by absolute immunity. See 58 U.S.L.W. 3827. This indicates that the Court is interested in exploring the scope of *Imbler v. Pachtman*, 424 U.S. 409 (1976), and the application of the functional analysis test. For this reason, and given the nature of the issue and facts presented by the instant case, Respondent does not argue that the question presented by this case is neither substantial nor important. However, for the reasons set forth below, the Court should deny the petition for certiorari in the instant case, or, in the alternative, delay disposition until a decision has been issued in *Burns v. Reed*.

### I. THE DECISION OF THE WYOMING SUPREME COURT THAT RESPONDENT'S ACTIVITIES WERE THE FUNCTIONAL EQUIVALENT OF A PROSECUTOR'S ROLE AS AN ADVOCATE WAS BASED ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

The Wyoming Supreme Court was presented with the question of whether "the deputy county attorney's activi-

ties of assisting the Department, of using the perjured probation revocation petition to obtain a bench warrant for [Petitioner's] arrest, and of causing [Petitioner] to be arrested and detained were administrative in nature [or were] the functional equivalent of the prosecutor's role as an advocate in a criminal proceeding." *Cooney v. Park County*, 792 P.2d at 1293. In deciding whether Respondent's activities "were intimately associated with the judicial phase of the criminal process" and hence were "functions to which the reasons for absolute immunity apply with full force," *Imbler v. Pachtman*, 424 U.S. at 430, the court reviewed the nature of the probation revocation process under Wyoming law. *Cooney v. Park County*, 792 P.2d at 1293-1294. The court concluded that probation revocation proceedings were, under Wyoming law, "an integral part of the judicial phase of the criminal process." *Id.* at 1294. In light of that conclusion, the court applied the functional analysis test set forth in *Imbler*, and held that Respondent's activities were advocatory, "intimately associated with the judicial phase of the criminal process," and entitled to aboslute immunity. *Cooney v. Park County*, 792 P.2d at 1295, 1298, quoting *Imbler v. Pachtman*, 424 U.S. at 430.

The Wyoming Supreme Court's conclusion that probation revocation proceedings were "an integral part of the judicial phase of the criminal process" was based on Wyoming law. *Cooney v. Park County*, 792 P.2d at 1293-1294. Furthermore, the Wyoming Supreme Court's conclusion that Respondent's activities in conjuction with the probation revocation proceedings were "intimately associated with the judicial phase of the criminal process," entitled to absolute immunity, *Cooney v. Park County*, 792 P.2d at 1298, was entirely consistent with this Court's holding in *Imbler* that "in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under Section 1983." *Imbler v. Pachtman*, 424 U.S. at 431. Therefore, review by this Court

is precluded because the Wyoming Supreme Court's decision is based on adequate and independent state grounds. *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945).

## II. THE CASES RELIED UPON BY PETITIONERS DO NOT DEMONSTRATE A CONFLICT IN THE LOWER COURTS ON THE QUESTION PRESENTED BY *COONEY v. PARK COUNTY*.

Petitioners urge this Court to grant a petition for writ of certiorari by alleging that a conflict exists in the federal circuit courts of appeal. (Pet. pp. 20-26.) However, the three cases upon which Petitioners rely did not deal with the issue presented either to the Wyoming Supreme Court or to this Court. In addition, the decisions are distinguishable, and thus afford no basis upon which this Court should base an exercise of its discretion in granting the petition.

The issue before the Court deals with the level of immunity to be afforded to a prosecutor involved in probation revocation proceedings. The cases upon which Petitioners rely dealt exclusively with the level of immunity to be afforded to a probation officer - an issue not before either this Court or the Wyoming Supreme Court, see *Cooney v. Park County*, 792 P.2d at 1298; *cf. Ray v. Pickett*, 734 F.2d 370 (8th Cir. 1984); *Galvan v. Garmon*, 710 F.2d 214 (5th Cir.), cert. denied 466 U.S. 949 (1983); *Wolfel v. Sanborn*, 691 F.2d 270 (6th Cir. 1982), cert. denied 459 U.S. 1115 (1983). The cases did not discuss whether a prosecutor engaging in the same conduct would be entitled to only qualifed immunity, nor do they stand for the proposition that a probation officer would never be entitled to absolute immunity depending upon the nature of the conduct in which he engaged. *Compare Farrish v. Mississippi State Parole Board*, 836 F.2d 969 (5th Cir. 1988).

Furthermore, the analysis employed by the courts in those cases distinguishes them from this case, and from the previous decisions of this Court. In *Imbler v. Pachtman*, this Court established a functional analysis test to determine if challenged activities were "an integral part of the judicial process," "intimately associated with the judicial phase of the criminal process," entitled to the shield of absolute immunity. *Id.*, 424 U.S. at 430. The focus on the judicial nature of the challenged activities, and application of the functional analysis, were reiterated in later cases. *Butz v. Economou*, 438 U.S. 478 (1978). In *Briscoe v. LaHue*, 460 U.S. 325, 342 (1983), this Court commented that "immunity rests on functional categories, not on the status of the defendant."

The Court has set forth three factors to be considered in determining the applicability of absolute immunity to a particular function: (1) the existence of an historical or common-law basis for immunity; (2) whether performance of the duty poses obvious risks of subsequent litigation against the official; and (3) whether there exist alternate means of redressing wrongful conduct. *Mitchell v. Forsyth*, 472 U.S. 511, 521-523 (1985). Analysis of a challenged function in light of these three factors has led to varying levels of immunity being afforded to different officials. For example, in *Malley v. Briggs*, 475 U.S. 335 (1986), a police officer who had obtained an arrest warrant on the basis of a complaint and affidavit which failed to establish probable cause, was entitled only to qualified immunity. The Court distinguished the policeman's acts from the conduct of a prosecutor initiating an indictment, which would be entitled to absolute immunity. The three factors articulated in *Mitchell v. Forsyth* were used in the analysis: at common-law, a complaining witness was not entitled to absolute immunity, although a prosecutor was; the police officer was not as intimately associated with the judicial phase of the criminal process as the prosecutor; and the police

officer was not governed by well-developed professional standards nor subject to an established disciplinary process that the prosecutor was subject to through the organized bar. *Malley v. Briggs*, 475 U.S. at 340-343 n. 5. Even though the challenged activity was one in which either a prosecutor or a police officer could have engaged, the police officer was afforded only qualified immunity.

Petitioners ask the Court to ignore this critical three-factor analysis, and to look *only* at the conduct involved - a superficial analysis which, if applied in *Malley*, would have led to the opposite result. None of the three cases upon which they rely analyzed the immunity issue in light of the *Mitchell v. Forsyth* factors - indeed, one case neither cited *Imbler* nor applied the functional analysis test, *Wolfel v. Sanborn, supra* - and none discussed the level of immunity afforded to prosecutors. Thus, the cases do not demonstrate that a conflict exists on the question presented to the Court, nor provide a reason for the Court to exercise its discretion by granting the petition.

## CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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